**MISCONDUCT OF ARBITRATOR**

Arbitration is a form of legal alternate dispute settlement mechanism. It is regulated by the Arbitration and Conciliation Act, 1996, in India. Arbitration awards are binding and cannot be appealed against or set aside unless conditions of Section 34 of the Act are enacted, such as Incapacity of a party, Arbitration agreement not being valid, Party not given proper notice of arbitral proceedings, Nature of dispute not falling within the terms of submission to arbitration, Arbitral procedure not being in accordance with the agreement. Further, Section 34(2)(b) mentions two more grounds which are left with the Court itself to decide whether to set aside the arbitral award- Dispute is not capable of settlement by arbitral process and The award is in conflict with the public policy of India. Section 12 and 13, additionally, elucidate the removal of arbitrators by specifying the grounds for challenge and the procedure for challenge. Section 12 states the grounds as either being a justiciable doubt on an arbitrator’s impartiality or independence or there being a lack of the qualifications possessed by the arbitrator, provided it is necessary for the parties, as per the agreement.

Misconduct by an arbitrator is implied, however, not clearly defined in the Act itself. The rules regarding misconduct have been largely clarified and expanded by the judicial precedence on the matter.

However, procedural misconduct is addressed in Section 34(2)(a)(v) provide that an award can be challenged if the composition of the Tribunal was not in accordance with the agreement, or the procedure agreed to by the parties was not followed in the conduct of proceedings, or in the absence of agreement as to procedure, the procedure prescribed by the Act was not followed. This is also known as illegality in arbitral procedure or failure to adhere to arbitral procedure.
Taking up a matter which is evidently beyond scope of the tribunal is also considered as misconduct by arbitrator. It is also to be noted that an award in which the arbitrator has deliberately deviated from the terms of reference and arbitration agreement will amount to misconduct of the arbitrator, as well. Section 12 and 13 of the Act, also support these principles.

In *State Trading Corp. v. Molasses Co., the Bengal Chamber of Commerce[[1]](#footnote-2)*, a permanent arbitral institution, did not allow a company to be represented by its Law Officer, who was full time employee of the company. The Court held that it was not only misconduct of the arbitrator but also misconduct of the arbitration proceedings.

Also, in *Vijay Kumar v. Bathinda Central Co-operative Bank and ors.[[2]](#footnote-3)*it was held that “it is a typical case where the arbitrator misconducted the proceedings and also misconducted himself. Arbitrator held the first and only hearing on May 17, 2010. No points for settlement or issues were framed. The bank filed affidavits of four employees. Appellant was not given opportunity to cross examine them. He was denied the opportunity to produce evidence. A complete go bye was given to the provisions of law, procedure and rules of justice. It would thus be seen that appellant was unable to present his case.”[[3]](#footnote-4) Thus, misconduct has been given meaning through cases and precedents more than statutory provisions.

Some other examples, however, of misconduct by arbitrator are proceeding ex parte without sufficient cause; denial of opportunity to parties; acting against the mandate given to the arbitrator under the agreement; failure or refusal to consider counter-claim of the respondent etc.[[4]](#footnote-5)

One of the most important cases to discuss the procedure for misconduct by arbitrator is *Cochin Shipyard Ltd. v. Apeejay Shipping Ltd.[[5]](#footnote-6).* The recent case by Bench of Justice DipakMisra and Justice Prafulla C Pant, has discussed in detail the consequences of misconduct by arbitrator under Section 30 and 33 of the Act. The case has held that there needs to be no oral evidence adduced or admitted in the Court to prove misconduct by arbitrator, as legal misconduct has to be evident and proved from the proceedings carried on before the arbitrator.
In this case, the lower court disallowed a plea to have the arbitrator questioned as a witness on this count, but allowed examination of a general manager in Apeejay.
While this dispute was pending, Apeejay sought the civil court’s permission to question both the arbitrator and a general manager to substantiate its charge of misconduct against the arbitrator.
The civil court said there was no need to examine the arbitrator after two years and also disallowed Apeejay from examining the general manager. A Kerala High Court single judge later allowed Apeejay to examine the general manager to substantiate its claim of misconduct on the arbitrator’s part.
The HC, however, upheld the civil court finding that there was no ground to question the arbitrator since five years had already passed since the award. Cochin Shipyard challenged the high court order in the top court to the extent that it allowed Apeejay to bring in the general manager as a witness.
Apeejay claimed that it had not been given adequate opportunity to be heard.
The Apex Court, however, allegations against the arbitrator, which amounted to legal and not moral misconduct, could be established from the records.The allegations, it recorded, included failure to consider relevant documents, giving reasons in defense of the award which do not flow from the material on record and the conduct of the arbitrator during the arbitral proceedings in recording of the minutes.
The bench drew from an earlier three-judge bench judgment to rule that legal misconduct would be complete if the arbitrator on the face of the award arrives at an inconsistent conclusion or arrives at a decision by ignoring material documents which can help in arriving at a just and fair decision.
“As far as legal misconduct is concerned… the same must be manifest or palpable from the proceedings before the arbitrator. To elaborate, a person urging the ground of legal misconduct has to satisfy the court from the records of the arbitral proceedings that there has been a legal misconduct on the part of the arbitrator as a consequence of which the award gets vitiated,” the bench ruled. [[6]](#footnote-7)

However, even older cases recognized that misconduct by arbitrator must result in setting aside of award by the arbitrator, if proven. In *ShambhuDayalAndOrs. vs Pt. BasdeoSahai*[[7]](#footnote-8), I was held that “It is, therefore, manifest that in determining whether an arbitrator has been guilty of misconduct and his award has consequently to be set aside the Court determines a jurisdictional fact. The Court certainly possesses jurisdiction to decide whether or not an arbitrator has committed a misconduct but the decision that he has committed a misconduct and the. award should on that account be set aside has the effect of reconferring upon the Court the jurisdiction to decide a matter which but for the setting aside of the award, it could not have been competent to decide. That being so, the Court exercises a jurisdiction not vested in it by law if it decides wrongly the question whether an arbitrator has been guilty of misconduct and his award should on that account be set aside.”

An arbitrator may also be accused of misconduct if s/he exceeds the jurisdiction. This was held in the case of *Bhagawati Oxygen Ltd vs Hindustan Copper Ltd[[8]](#footnote-9),* where the Arbitrator was charged with misconduct because he had wrongly decided to not cover questions regarding a Clause. However, some other judgments have ruled the opposite, thus, leaving this question to discretion.[[9]](#footnote-10)

However, legal misconduct must be obvious from the award or should be covered by the Act itself, such was held in *Indian Commercial Co Ltd VsAmrishKilachand[[10]](#footnote-11),* where the petitioner challenged the award on the ground of legal misconduct of the arbitrator, because of denial of an opportunity to the defendants to defend themselves. An issue regarding whether it is permissible to challenge the award on grounds that are not provided by the Act, arose.
It was held that legal misconduct of the arbitrator cannot be decided by the court in execution, since it is not a question relating to the execution, discharge or satisfaction of the decree but involves the determination of the manner in which the arbitrator conducted the proceedings.
It was further held that section 34 does not provide legal misconduct as one of the grounds for setting aside the award. Having regard to the legal policy of making an award immune from challenge on this ground, it would not be open to the court to entertain a challenge on grounds not provided in the Act, barring something in the nature of fraud or nullity which goes to the foundation of the award or decree. The alleged misconduct would have to be of a nature which appears on the face of the record and does not require in depth examination of the issues which could have been raised in the arbitral proceedings or in the petition for setting aside the award. Hence, if the question of legal misconduct must be gone into, it must be of the kind which is obvious from the award and does not require any other evidence which cannot be deduced from the prima facie case.[[11]](#footnote-12)

Thus, we can conclude that laws to deal with misconduct of arbitrator have to be clarified and have to be, more consistent in order to be implemented fairly. The precedents and provisions have to be culminated into a standard set of guidelines or provisions to be applicable to the entire country. However, it is interesting to note that India is not the only nation that has faced such problems due to the lack of legislation on such matter; recently, labor law specialist of South Africa, Michael Bagraim has also come out with the importance of consistent guidelines for misconduct of arbitration. However, such guidelines have been developed in South Africa by the Commission for Conciliation Mediation and Arbitration (CCMA)[[12]](#footnote-13), and thus, Indian Authorities must also take proactive steps to standardize rules and guidelines on this matter.

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